

OGC 77-1538

10 January 1977

MEMORANDUM FOR:

THROUGH :

FROM :

Office of General Counsel

SUBJECT : Proposed Revision of Agency Secrecy Agreements

1. Our problems with the present secrecy arrangements for employees and contractors are basically three-fold:

(a) Employees and former employees must be restricted from divulging, directly or indirectly, classified information acquired during the course of their employment.

(b) Contractors and former contractors must be restricted from divulging, directly or indirectly, classified information acquired during the course of their employment.

(c) Present secrecy agreements are essentially "paper tigers," lacking precise language and substantive penalties for disclosure.

It will be necessary to draft a new secrecy agreement--or at least insert new clauses into existing agreements--that will adequately resolve the three problems cited above.

2. Employees and Former Employees. Some former Agency employees have apparently been attempting to purchase highly sensitive operational items from companies that contract with the Agency for the construction of those items. These former employees hope to act as "brokers" for private clients and foreign governments in obtaining equipment similar to that used by the Agency. The dangers inherent in this practice are obvious: not only are classified contractual arrangements compromised and classified items provided to unauthorized persons, but Agency sources and methods are divulged. Present and former contractors and

employees must be effectively prevented from disclosing such information, and they must know they are effectively prevented from doing so. It is strongly recommended that both criminal and civil sanctions be clearly cited in the secrecy agreements. Although these agreements are rarely if ever enforced in court, it is nevertheless desirable to retain the option.

3. The following clauses are proposed for inclusion in all secrecy agreements, with such modifications as may become necessary. It would be advisable to standardize these agreements into one or two basic documents, if possible.

4. Civil Remedies. Should the U.S. Government choose to pursue its civil remedies in court, it will need more precise language drafted into its secrecy agreements. If a remedy is clearly and expressly stated in the agreements, there is a much greater likelihood that the courts will enforce it.

(a) COMPREHENSIVE PLEDGE OF SECRECY. A more precise pledge of secrecy is required, one that includes instruments, appliances, and equipment, in addition to classified documents. The following clause could be enforced as are provisions concerning trade secrets:

I realize that all classified materials and materials disclosing intelligence sources and methods acquired by me during the course of my [employment/association] with the U.S. Government are sensitive and confidential, and I pledge that I will never without prior written authorization from the U.S. Government publish or reveal by any means such information, whether the information be in the form of document, writing, book, sketch, photograph, photographic negative or film, blueprint, plan, map, model, instrument, appliance, note, or equipment.

(b) INJUNCTION. One of the few practical avenues open to the Agency when a disclosure is threatened is the injunction. An injunction is much more easily obtained where the groundwork has been previously laid in a written agreement.

I fully realize that unauthorized disclosure of intelligence sources and methods and classified information acquired by me during the course of my [employment/association] with the U.S. Government will cause irreparable injury to the U.S. Government, and I hereby give my express consent to any appropriate court for the appropriate order to be issued prohibiting disclosure.

(c) ASSIGNMENT. When one discloses defense secrets, his motivation is usually either ideological or financial--but most often financial. One way to discourage such disclosures is through the use of an assignment or constructive trust.

I hereby assign to the U.S. Government all rights, title and interest in and all royalties, remunerations, and emoluments that have resulted or will result or may result from any such divulgence, publication or revelation not authorized by the terms of this agreement.

(d) BREACH OF CONTRACT AND FRAUD. In any civil action it is helpful to have a written admission of breach of contract or fraud.

I understand that any such unauthorized divulgence, publication or revelation will constitute a substantial breach of contract against the U.S. Government. I hereby declare that any false statement made herein concerning such unauthorized disclosures is made knowingly and willfully, thereby creating a fraud upon the U.S. Government.

(e) LIQUIDATED DAMAGES Although liquidated damages provisions are carefully scrutinized by the courts, we may still wish to include such a provision in the secrecy agreements.

Inasmuch as any breach of this secrecy agreement would be a breach of contract and would cause serious damage to be incurred by the U.S. Government, and inasmuch as it would be extremely difficult to assess the precise amount of damages incurred, I hereby agree that liquidated damages may be set, not as a penalty, in the reasonable sum of \$____.00.

(f) CONVERSION. 18 U.S.C. 793(d) provides that all classified materials must be returned on demand to the Government. Failure to do so could conceivably constitute conversion, and a provision to that effect in the secrecy agreement would be helpful. Conversion carries with it punitive damages, and punitive damages tend to influence behavior.

Failure to return any classified materials or materials disclosing intelligence sources and methods to the U.S. Government on demand shall constitute conversion, for which I may be liable for punitive damages.

(g) SIGNATURES. The section of the agreement containing signatures should be clear and authoritative. There should be no doubt as to who shall be liable, in both civil and criminal cases, in case of a breach of security.

(DATE)

(SIGNATURE OF AFFIANT)

INDIVIDUALLY AND AS AUTHORIZED AGENT FOR

(NAME OF ORGANIZATION)

SWORN TO BEFORE ME THIS ____ DAY OF _____, 19 ____.

(WITNESS OR NOTARY ATTESTATION)

RESIDING AT _____

(CITY)

-SEAL-

MY COMMISSION EXPIRES _____

(DATE)

5. Criminal Penalties. Criminal penalties cannot be increased by any secrecy agreement, but the agreement can serve to establish several requirements for a successful criminal prosecution or for a meaningful threat thereof.

(a) KNOWLEDGE OF INJURY. One of the prerequisites for a successful prosecution of 18 U.S.C. §§791 et. seq. is criminal intent, and the essence of criminal intent is knowledge that one's behavior will produce a specific harmful result. The following provision is a clear admission that the signer is aware that unauthorized disclosures will harm the nation.

I fully realize that if I should divulge classified materials or materials disclosing intelligence sources or methods without prior express U.S. Government authorization, such divulgence will cause injury to the United States and will be used to the advantage of a foreign nation, as provided at 18 U.S. Code, sections 792 through 798.

(b) KNOWLEDGE OF ILLEGALITY. Another facet of criminal intent as it pertains to the espionage laws is knowledge that one is acting illegally.

I hereby acknowledge that any such unauthorized disclosure or retention by me will have been in knowing violation of the espionage laws as found at 18 U.S. Code, sections 792 through 798, which are attached hereto and which I have read and understand.

(c) GOVERNMENT EMPLOYEES. Additional criminal statutes of interest concern conflict of interest for present and former Government employees and may be found at 18 U.S. Code, sections 207 and 208. Once again, it is helpful to establish intent.

I fully realize that if I should act for anyone other than the United States in connection with any proceeding, application, contract or other matter in which the United States is a party or has a direct and substantial interest, and in which I participated personally and substantially as an employee of the United States, and if I should do so without the prior written authorization of the U.S. Government, I am doing so in knowing violation of the criminal statutes found at 18 U.S. Code, sections 207 and 208, which are attached hereto and which I have read and understand.

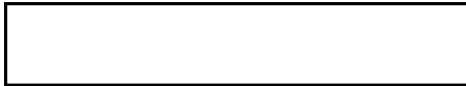
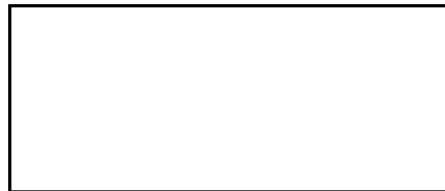
(d) FRAUD. Closely related to the civil charge of fraud, discussed supra at section 4(d), is the criminal charge of fraud. Here also it is important to establish criminal intent.

I have carefully read this document and its attachments and I hereby declare that any false statements made by me herein are made knowingly and willfully, and in violation of 18 U.S. Code, section 1001, which is attached hereto and which I have read and understand.

6. The clauses cited hereinabove should fulfill the two requirements of Agency secrecy agreements: they will establish the requisite knowledge and intent for any proposed civil or criminal action; and they will effectively intimidate all but the most reckless of Agency employees and contractors. Of particular interest to the Agency, use of the above provisions may obviate the need to establish knowledge and intent by publishing the very classified documents we had hoped to protect. Instead, the Agency can point to the individual's own declaration that the material in question was confidential and sensitive, and that his actions were willful and knowing.

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cc:

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UNCLASSIFIED		CONFIDENTIAL		SECRET	
OFFICIAL ROUTING SLIP					
TO	NAME AND ADDRESS		DATE	INITIALS	
1	[] IC Staff				
2	Rm. 7C35, Hqs.				
3					
4					
5					
6					
ACTION		DIRECT REPLY		PREPARE REPLY	
APPROVAL		DISPATCH		RECOMMENDATION	
COMMENT		FILE		RETURN	
CONCURRENCE		INFORMATION		SIGNATURE	
<p>Remarks: Attached please find a copy of the memo I spoke to you about concerning revisions of Agency secrecy agreements. The request to which this memo is responsive originated in our Office from our Logistics & Procurement Law Division. It is therefore particularly applicable for dealings with contractors. Most of the provisions, however, are equally useful when dealing with employees. If you have any questions please feel free to contact me.</p> <div style="border: 1px solid black; height: 60px; width: 100%;"></div>					
FOLD HERE TO RETURN TO SENDER					
FROM: NAME, ADDRESS AND PHONE NO.				DATE	
OGC, [] 7C24, Hqs.				10 Mar 77	
UNCLASSIFIED		CONFIDENTIAL		SECRET	

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Approved For Release 2006/01/17 : CIA-RDP82M00591R000400070005-7

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